

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
(Norfolk Division)**

BUILDERS MUTUAL INSURANCE COMPANY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 2:10cv324
)	
THE FUTURA GROUP LLC, et al.)	
)	
Defendants.)	

PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE

Plaintiff Builders Mutual Insurance Company ("BMIC"), by counsel, and pursuant to this pursuant to this Court's November 3, 2010 Order to show cause as to why defendants The Futura Group, L.L.C. ("Futura") and Bay Reflections, L.L.C. ("Bay Reflections") should not be dismissed as defendants in this action for lack of service within the required 120 day period, respectfully submits its response to the Court's order.

Service was in fact timely made on July 13, 2010, eleven (11) days after the Complaint was filed, per the proofs of service attached hereto.¹ However, proofs of service were not filed by the process server, Quality Process Service, Inc. That company's telephone has been disconnected and the company would now appear to be no longer in operation. Counsel for BMIC received the proofs of service from the process server shortly after service was effected, but did not become aware of the process server's failure to file same until receipt of the Court's order to show cause. Notwithstanding that they were served within ten days of the filing of the Complaint, Futura and Bay Reflections have not filed responsive pleadings; and may not be

¹ See Exhibits A and B hereto, copies of the proofs of service now filed with the Court, reflecting service on the registered agents of Futura and Bay Reflections on July 13, 2010.

currently operational, as the Virginia State Corporation Commission's records indicate that Bay Reflections' corporate status was terminated on December 31, 2009 for failure to pay fees. BMIC is nevertheless defending Futura in the action below brought by Benjamin R. Proto and Holly Proto ("the Protos"), pending a determination in this action of BMIC's defense obligations under its Policy of Insurance issued to Futura and Bay Reflections.

The proofs of service have now been filed.² No prejudice has been caused any party because of the delay in filing proofs of service. (Indeed, all that has occurred to date is that the Protos have moved for a discretionary stay of this action pending completion of the underlying suit.) Consequently, BMIC respectfully asks that the Court not dismiss Futura and Bay Reflections as defendants herein, and to permit proof of service to be amended pursuant to Fed. R. Civ. P. 4(l)(3) ("Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.").³

Dated: November 19, 2010

Respectfully submitted,

BUILDERS MUTUAL INSURANCE COMPANY

By Counsel

/s/
 Danny M. Howell VSB No. 30352

² See also Exhibits C and D hereto, reflecting that the registered agents served are currently the registered agents for Futura and Bay Reflections.

³ Amendment has been allowed by courts under similar circumstances. See e.g., Leal v. Computershare, 2010 U.S. Dist. LEXIS 103909 * 8 (D. Nev. Sept. 28, 2010) (Where service was made within 120 days and therefore valid pursuant to Fed. R. Civ. P. 4(l)(3), but no proof of service was filed within that time period, the Court allowed proof to be amended and declined to dismiss defendant.); Maier v. New York City Police Dep't, 2009 U.S. Dist. LEXIS 78821, ** 14-15 (E.D.N.Y. Sept. 1, 2009), citing Fifth Third Bank v. Mytelka, 2008 U.S. Dist. LEXIS 63435 * 2 (E.D.N.Y. Aug. 16, 2008) ("Generally, the failure of the plaintiff to prove service of process does not necessarily affect the validity of service as the district court may permit proof of service to be amended under Fed. R. Civ. P. 4(l)(3)."); Bender v. Intersil Corp., 2009 U.S. Dist. LEXIS 83679, ** 6-7 (N.D. Cal. Sept. 14, 2009) (same).

Mikhael D. Charnoff VSB No. 43929
SANDS ANDERSON PC
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
Telephone: (703) 893-3600
Facsimile: (703) 893-8484
Counsel for Builders Mutual Insurance Company

and

Jeffrey H. Geiger VSB No. 40163
Kelly Beth LaPar
SANDS ANDERSON PC
1111 East Main Street, 24th Floor
P. O. Box 1998
Richmond, Virginia 23218-1998)
Telephone: (804) 783-7248
Facsimile: (804) 783-7291
E-mail: jgeiger@sandsanderson.com
Counsel for Builders Mutual Insurance Company

CERTIFICATE OF SERVICE

I certify that on November 19, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

William A. Lascara, Esquire
James T. Lang, Esquire
Alysha N. Fulkerson, Esquire
Pender & Coward, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, Virginia 23462
(757) 490-6265
Fax: (757) 456-2935
Email: wlascara@pendercoward.com
Counsel for Benjamin R. Proto and Holly Proto

/s/
Danny M. Howell

ORIGINAL

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the
Norfolk Division

Eastern District of Virginia

NOV 17 2010

CLERK, U.S. DISTRICT COURT
NORFOLK, VA

Builders Mutual Insurance Company

Plaintiff

v.

The Futura Group, L.L.C., Bay Reflections, L.L.C.,
Benjamin R. Proto and Holly Proto

Defendant

Civil Action No. 2:10cv324

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

The Futura Group, L.L.C.
c/o Stacy S. Temple, Registered Agent
Tomlin Temple PC
291 Independence Blvd.
Pembroke Four, Suite 219
Virginia Beach, VA 23462
A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Kelly B. LaPar, Esquire (VSB No. 76041)
Sands Anderson PC
P.O. Box 1998
Richmond, VA 23218-1998
Phone: (804) 648-1636

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT, FERNANDO GALINDO

L. HOWARD

Signature of Clerk or Deputy Clerk

Date: July 6, 2010

EXHIBIT

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A

AO 440 (Rev. 12/09) Summons in a Civil Action (Page 2)

Civil Action No. _____

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for (name of individual and title, if any) The Futura Group, L.L.C.
was received by me on (date) _____.

☐ I personally served the summons on the individual at (place) _____
on (date) _____; or

☐ I left the summons at the individual's residence or usual place of abode with (name) _____
_____, a person of suitable age and discretion who resides there,
on (date) _____, and mailed a copy to the individual's last known address; or

☒ I served the summons on (name of individual) Stacy Temple, Registered Agent, who is
designated by law to accept service of process on behalf of (name of organization) Futura Group, LLC
291 Independence Blvd, Pembroke 1V, Ste 219 on (date) 7-13-10 @ 12:38 pm or
VA Beach, VA 23462

☐ I returned the summons unexecuted because _____; or

☐ Other (specify): _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Michael A. Windley

Server's signature

Michael A. Windley, Private Process Server

Quality Process Services, Inc. and title
P.O. Box 61129
Virginia Beach, VA 23466
757-486-9600

Server's address

Additional information regarding attempted service, etc:

ORIGINAL

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the
Eastern District of Virginia
Norfolk Division

FILED

NOV 17 2010

CLERK, U.S. DISTRICT COURT
NORFOLK, VA

Builders Mutual Insurance Company

Plaintiff

v.

The Futura Group, L.L.C., Bay Reflections, L.L.C.

Benjamin R. Proto and Holly Proto

Defendant

Civil Action No. 2:10cv324

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Bay Reflections, L.L.C.
c/o Michael A. Inman, Registered Agent
Inman & Strickler
575 Lynnhaven Parkway, Suite 200
Virginia Beach, VA 23452

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Kelly B. Lapar, Esquire (VSB No. 76041)
Sands Anderson PC
P.O. Box 1998
Richmond, VA 23218-1998
Phone: (804) 648-1636

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT FERNANDO GALINDO

L. Howard
L. HOWARD

Date: July 6, 2010

Signature of Clerk or Deputy Clerk

EXHIBIT

B

AO 440 (Rev. 12/09) Summons in a Civil Action (Page 2)

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for (name of individual and title, if any) Bay Reflections, L.L.C.
was received by me on (date) 7-12-10.

☐ I personally served the summons on the individual at (place) _____
on (date) _____; or

☐ I left the summons at the individual's residence or usual place of abode with (name) _____
_____, a person of suitable age and discretion who resides there,
on (date) _____, and mailed a copy to the individual's last known address; or

☒ I served the summons on (name of individual) Melanie Bryant, Authorized Agent who is
designated by law to accept service of process on behalf of (name of organization) Bay Reflections, LLC
575 Lynnhaven Pkwy, Ste. 200, VA Beach, VA on (date) 7-13-10 @ 9:17am; or

☐ I returned the summons unexecuted because _____; or

☐ Other (specify): _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: 7-14-10

Michael A. Windley
Server's signature

Michael A. Windley, Private Process Server
Quality Process Services, Inc.
P.O. Box 61129
Virginia Beach, VA 23466
757-486-9600

Server's address

Additional information regarding attempted service, etc:

INMAN & STRICKLER P.L.C.

ATTORNEYS AND COUNSELORS AT LAW

KEITH DENSLOW • ELIZABETH M. DIETZMANN • MICHAEL A. INMAN • STEWART M. KAHN*
BARRY RANDOLPH KOCH • JEANNE S. LAUER • STEVEN L. LAUER • GREGORY J. MONTERO
VINCENT R. OLIVIERI • ANDREA W. PHELPS • STEPHEN A. STRICKLER • ROS R. WILLIS

**Also admitted in NY, FL & SC*

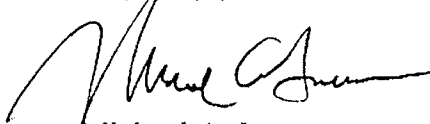
February 3, 2010

To Whom It May Concern:

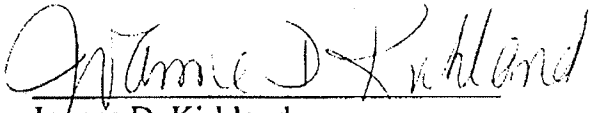
Re: Civil Process Service

This letter will confirm that any documents which are to be served on me in my capacity as a registered agent or authorized representative of any other entity may be left with my Legal Assistants, Joanne D. Kirkland or Terri Richardson, or my receptionist, Melanie Bryant.

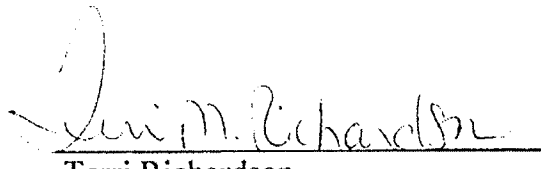
Very truly yours,



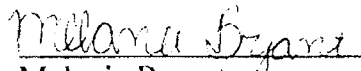
Michael A. Inman



Joanne D. Kirkland
(For I.D. Purposes)



Terri Richardson
(For I.D. Purposes)



Melanie Bryant
(For I.D. Purposes)

S
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Commonwealth of Virginia
State Corporation Commission

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11/19/10

09:33:42

LLCM6150

LLC AGENT INQUIRY

LLC ID: S123953 - 4 LLC STATUS: 01 FEE DELINQ
LLC NAME: FUTURA GROUP, L.L.C., THE

CURRENT REGISTERED AGENT:

NAME: STACY S TEMPLE
STREET: PEMBROKE FOUR STE 219
291 INDEPENDENCE BLVD
CITY: VIRGINIA BEACH STATE: VA ZIP: 23462-0000
STATUS: 4 MEMBER OF EFF DATE: 12/09/05 LOC: 228 VIRGINIA BEACH CITY

OLD REGISTERED AGENT:

NAME: STACY S TEMPLE
STREET: 291 INDEPENDENCE BLVD
PEMBROKE FOUR STE 219
CITY: VIRGINIA BEACH STATE: VA ZIP: 23462-0000
STATUS: 4 MEMBER OF EFF DATE 05/21/04 LOC: 228 VIRGINIA BEACH CITY

(Screen Id:/LLC_Registered_Agent_Inquiry)



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11/19/10

09:33:03

LLCM6150

LLC AGENT INQUIRY

LLC ID: S015778 - 6 LLC STATUS: 19 CANC (AUTO
LLC NAME: BAY REFLECTIONS BUILDING, L.L.C.

CURRENT REGISTERED AGENT:

NAME: MICHAEL A INMAN
STREET: 575 LYNNHAVEN PKWY STE 200

CITY: VIRGINIA BEACH STATE: VA ZIP: 23452-0000
STATUS: 4 MEMBER OF EFF DATE: 11/27/00 LOC: 228 VIRGINIA BEACH CITY

OLD REGISTERED AGENT:

NAME: MICHAEL A INMAN
STREET: 2840 S LYNNHAVEN RD

CITY: VIRGINIA BEACH STATE: VA ZIP: 23452-0000
STATUS: 4 MEMBER OF EFF DATE 08/01/96 LOC: 228 VIRGINIA BEACH CITY

(Screen Id:/LLC_Registered_Agent_Inquiry)

